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No. 90-388

In The

Supreme Court of the United States

October Term, 1990

DOW CHEMICAL COMPANY AND
SHELL OIL COMPANY,

Petitioners,

v.

DOMINGO CASTRO ALFARO, et al.,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Texas

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether defendants are denied due process by having to defend a suit brought by Costa Rican citizens in Texas, site of defendants' headquarters or major operations, when plaintiffs consent to come to Texas at their own expense for deposition, medical examination and trial, and when the claims arose out of defendants' actions in the United States.

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STATEMENT OF THE CASE

Respondents do not disagree with the Petitioners' recitation of the procedural history of this case, or with the irrelevant description of other cases. Petitioners have failed, however, to bring several important facts to the Court's attention.

At the time suit was filed, Petitioners were not subject to jurisdiction in Costa Rica. To this day, they are subject to Costa Rican jurisdiction only by virtue of their eager stipulation of consent to it. Tr. 815, 817.

Remarkably, the petition does not disclose that Petitioner Shell Oil Company's world headquarters are in Houston, Texas and that Petitioner Dow Chemical Company, headquartered in Michigan, has extensive operations and the country's largest chemical plant in and near Houston. See concurring opinion of Justice Doggett, App. 18.

The petition also does not state that plaintiffs have agreed to present themselves in Houston at their own expense for deposition, medical examination and trial, and that Shell stipulated that all of its documents relating to the pesticide that sterilized plaintiffs are located in Houston. Tr. 815; App. 18.

Respondents claim that exposure to pesticides manufactured and sold by Petitioners rendered Respondents irreversibly sterile. The pesticides, based on the chemical dibromochloropropane, were designed, tested, manufactured, labeled, and distributed by Petitioners in the United States. The Respondents' employer is headquartered in Florida. App. 17. Petitioners continued to sell the

pesticide for use abroad, and Respondents continued to be exposed, after DBCP was banned in this county. App. 17.

REASON FOR DENYING THE WRIT

This case is entirely unworthy of review by this Court. First, the case should be disposed of without review for failure to raise the due process claim timely below. Second, there simply is no need for the Court to address, let alone any possibility of upholding, the claim that it is a denial of due process for a defendant to have to litigate in its own backyard.

I. THE DUE PROCESS CLAIM WAS NOT RAISED TIMELY BELOW AND THEREFORE CANNOT BE CONSIDERED HERE.

Petitioners acknowledge at p. 6 of the petition that the constitutional argument it now presses was not raised until their petition for rehearing in the intermediate Texas Court of Appeals. This failure is fatal to review, for it is essential that a constitutional argument be raised in a timely manner in lower state proceedings. *Stembridge v. Georgia*, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 (1952) (constitutional claim raised in petition for rehearing to intermediate state court would not be reviewed); *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed. 98 (1962). The reasons for this longstanding rule are reiterated in

Cardinale v. Louisiana, 394 U.S. 437, 439, 89 S.Ct. 1162, 1164, 22 L.Ed.2d 398, 400 (1969).

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality.

Accordingly, a constitutional claim must be raised at the time prescribed by state practice. *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961). Here, the facts are plain. Both Petitioners answered Respondents' original petition, without raising any jurisdictional objections. The answer was a general appearance and thus a consent to jurisdiction. Tex. R. Civ. Proc. 121; *Trails East v. Mustafa*, 713 S.W.2d 422 (Tex.App. 1986, no writ).

Defendants also filed forum non conveniens motions, but perhaps because of the strangeness of such a claim, it did not even occur to them to claim that they would be *denied due process* by having to litigate in Texas.

Petitioners' general appearance waived any objection whatsoever to jurisdiction. it is therefore unnecessary to examine Texas procedure any further; it suffices to say that Texas follows the general rule that issues, including constitutional ones, raised for the first time on appeal are waived. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 856 (Tex.App. 1987, writ ref'd n.r.e.); *United States Reading*

Lab, Inc. v. Brockett, 551 S.W.2d 531 (Tex. Civ. App. 1977, no writ).[1]

Petitioners not only fail the threshold test of timely raising the due process claim, however; they also must acknowledge that the majority of the Texas Supreme Court was silent on the question. It must be assumed that the silence is due to the deficiency in timeliness. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3, 103 S.Ct. 2296, 2301 n.3, 76 L.Ed.2d 497 (1983); *Bailey v. Anderson*, 326 U.S. 203, 206-07, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945).

In these circumstances, where the due process claim was not raised until far too late, and where the majority below quite properly declined to consider it, there is no occasion for certiorari review here.

II. THE RULING BELOW IS ENTIRELY CONSISTENT WITH PRECEDENT AND DOES NOT REMOTELY IMPLICATE CONCERNS WORTHY OF REVIEW.

Seeking to elevate forum non conveniens to a new constitutional status, Petitioners must contend that they are entitled to it because otherwise they would be denied

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[1] The generalized due process claim made by Petitioners is properly viewed as a challenge to jurisdiction, in that Petitioners claim that having to defend in Texas would not comport with the second prong of the due process analysis and therefore the test for jurisdiction is not met. See petition at 11 n.9. Elsewhere, however, Petitioners seem to admit the existence of personal jurisdiction yet claim a sort of constitutional entitlement to forum non conveniens. Under either formulation, the constitutional argument came too late.

due process by having to litigate in Texas. It would be wholly unprecedented, however, to hold that a corporation is denied due process by litigating at home. Even if it is accepted that forum non conveniens is necessary to provide a "safety valve" for cases that otherwise meet "fair play" jurisdictional prerequisites – a dubious proposition with which Respondents strongly disagree – the facts of this case make it completely unsuitable as a means of deciding the issue.

A. No Precedent Even Hints at Petitioners' Position.

The failure of petitioners to cite one case from this Court – or any other court – even suggesting a denial of due process on similar facts underscores the lack of need for review here. The ruling below is squarely consonant with due process analysis.

Petitioners quote, selectively, only from two cases. The most recent is *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), in which the Court evaluated jurisdiction of a California court in an indemnity claim by a Taiwanese corporation against a Japanese corporation. The primary plaintiff had sued the Taiwanese defendant but settled, leaving only the indemnity claim against Asahi, the Japanese third-party defendant. Asahi moved to dismiss for lack of personal jurisdiction. This Court held, inter alia, that the "fair play and substantial justice" element of due process had not been met.

The present case would stand *Asahi* on its head. The first, and most important, "fair play" factor there was the burden on Asahi:

> Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.

Id., 480 U.S. at 114.

Here, by contrast, defendants are seeking the very burdens *Asahi* condemns. Having been sued at home, Petitioners stipulated to the jurisdiction of a foreign country where it could not have been sued, and sought to move the litigation far from the site of their own witnesses and evidence. This Court also noted that "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." Petitioners here are residents who *want* the burdens of *Asahi*; indeed they ask this Court to hold that they are constitutionally entitled to undertake what *Asahi* constitutionally forbids. As this case could not possibly coexist with *Ashai*, were Petitioners' position upheld, it should be left alone.

The other case quoted by Petitioners is *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). *Burger King upheld* jurisdiction over a Michigan resident by a Florida court; the defendant never visited Florida, sold products there, or employed anyone

or maintained a place of business there. Again, it is impossible for Petitioners' position to be reconciled with this case: the contacts here are simply qualitatively and quantitatively different.

Petitioners seize, however, on dictum by Justice Brennan in the opinion to the effect that in cases of substantial inconvenience to the defendant, but where "fair play" notions are satisfied, means short of denying jurisdiction can usually alleviate difficulties. See 471 U.S. at 477. It is this dictum that is the sole support for the proposed constitutional enshrinement of forum non conveniens.

Most recent commentators believe that forum non conveniens is an outdated, amorphous doctrine which serves only as to obscure jurisdictional decisionmaking. See, e.g., Robertson, *Forum Non Conveniens in England and America: a Rather Fantastic Fiction*, 103 Law Q. Rev. 97 (1988); Stewart, *Forum Non Conveniens: a Doctrine in Search of a Role*, 74 Cal. L. Rev. 1259 (1986). Even if the Court wishes to join the debate, however, or even to constitutionalize another layer of court-access doctrine, this is not the case in which to do it. As detailed immediately below, the assertions by Petitioners of difficulties in litigating are simply false, and there is no need for any "safety valve" doctrine.

B. The Difficulties Claimed by Petitioners Do Not Exist.

The assertions at pp. 14-15 of the difficulties faced by Petitioners, copied almost verbatim from the briefs to the Texas Supreme Court, Pet. App. 133, 147-48, are untrue, and tellingly are accompanied by no record citations. This

Court should forego review based on unsupported claims of hardship.

At the outset, it must be remembered that Petitioners did not even think to claim a due process violation until after appellate review; they litigated this case for over three years in the trial court, propounding discovery on substantive issues including limitations and product exposure. App. 21. As Justice Doggett noted in his concurring opinion, "[m]any of the so-called 'convenience' problems had already been resolved in this litigation prior to the dismissal under forum non conveniens." Pet. App. 21 n.4. How this Court should find a denial of due process where Petitioners did not even claim it in three years of litigation is not explained in the petition.

Pressing here the violation not even noticed below, Petitioners first state that "Plaintiffs' counsel has admitted that not all of the plaintiffs' treating doctors will be available for examination by Dow and Shell." Petition at 14. No record citation is given, and there is none. Plaintiffs did produce affidavits from most of their treating physicians that they *would* appear willingly in Houston, Pet. App. 18; in any event, there is no showing that any other physicians will not testify pursuant to a subpoena served under Tex. R. Civ. Proc. 188 or 200, or that other physicians are somehow more available to plaintiffs than to Petitioners.

Next, Petitioners state that "there is no assurance that all of plaintiffs' medical records will be produced, or that all pertinent records from the plaintiffs' Costa Rican employer will be produced." Pet. App. 14. There is never "assurance" in any injury case that all medical records

will be produced, and as plaintiffs bear the burden of proof, any difficulty in obtaining medical records will work against them. In any event Petitioners are entitled to an independent medical exam by the Texas Rules of Civil Procedure which will enable them to provide a complete medical defense. The court should note that Respondents have already agreed to appear for an independent medical exam in Houston, Texas, the expenses of travel to be borne by Respondents.

Petitioners apparently are attempting to deliberately mislead the Court when they state that plaintiffs' employer is Costa Rican; the employer is Standard Fruit Company, headquartered in Boca Raton, Florida. Pet. App. 17, 19. Standard Fruit is a subsidiary of Dole Fresh Fruit Company, which markets the bananas grown by plaintiffs under the Dole trademark. *Id.*

It is simply false, therefore, that Petitioners cannot compel testimony from the employer, since the employer is subject to a Texas subpoena. Furthermore, the claim that the employer will be uncooperative, or that "there is no assurance that Dow and Shell and their representatives would be granted access by the plaintiffs' employer to the site of the alleged exposure," Pet. App. at 15, is disingenuous. Standard Fruit agreed to indemnify Dow for claims resulting out of continued use of DBCP after the chemical was banned in the United States. See Letter Agreement between Dow and Standard Fruit, attached to Respondents' supplement brief in the Texas Supreme Court and included here in Respondents' Appendix at 11-15. It is highly likely, therefore, that the employer will make every effort to assist in the defense of this case.

Petitioners next state that they will be unable to join third-parties who are not subject to the jurisdiction of the Texas trial court. In the almost seven years that this case has been pending, Petitioners have never even identified, let alone sought to implead, any third-party defendants. Petitioners can no more involve imaginary third-party defendants than Respondents can invent primary defendants located in Texas. The obvious third-party defendant, if there is one, is the employer, an American entity.

The difficulties posed by Petitioners are illusory. As the issue here is whether this Court should review the due process claim, Respondents will omit discussion of the enormous, plainly preclusive difficulties they would face if trial were in Costa Rica. See generally Pet. App. at 23-24 n.6. Plaintiffs' interests are part of any "fair play" analysis. But the due process denial said to warrant review here is so far-fetched that inquiry need go no further.

Finally, it is worth noting that although all four dissenters in the Texas Supreme Court wrote separate opinions, none expressed the opinion that this was clearly a case that should be dismissed on forum non conveniens grounds or that created a due process problem. All four dissenting justices would have remanded to the trial court for further development. See Pet. App. at 41, 57, 68, 71 and 87. Indeed, Justice Cook, the only dissenter to discuss at any length the belated due process claim, wrote: "I do not lightly suggest that the due process clause is, or should be, implicated in the case before this court". Pet. App. at 68.

If the doctrine of forum non conveniens is suddenly to be given constitutional dignity, Respondents submit that the investiture should come in an appropriate case. This case is not one. Where no dissenter below felt strongly about the issue, where the difficulties said to create a due process denial simply do not exist, and especially where years of litigation and an appeal passed before Petitioners even thought to make the claim, there is no occasion for review. Inquiry into any constitutional necessity for forum non conveniens should await an appropriate case.

CONCLUSION

Respondents respectfully maintain that the due process claim was waived below, was accordingly not considered by the Texas Supreme Court, and so cannot be heard here. In any event, it is baseless; any constitutional treatment of forum non conveniens should await a case where the due process need is at least colorably presented.

Because the ruling below is incapable and unworthy of review, Respondents request that the petition for writ of certiorari to the Supreme Court of Texas be denied.

Respectfully submitted,

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APPENDIX

No. C-7743

IN THE
SUPREME COURT OF TEXAS

DOW CHEMICAL COMPANY AND
SHELL OIL COMPANY,
Petitioners,

v.

DOMINGO CASTRO ALFARO, ET AL.,
Respondents.

ON WRIT OF ERROR

SUPPLEMENTAL BRIEF IN RESPONSE TO NEW AMICI CURIAE'S AND OTHER POST-ARGUMENT BRIEFS

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March 1, 1989

SUPPLEMENTAL BRIEF IN RESPONSE TO NEW AMICI CURIAE'S AND OTHER POST-ARGUMENT BRIEFS

Recently an amicus curiae brief was filed by the Products Liability Council and the Motor Vehicle Manufacturers Association urging a new manner of construing the Tex.Civ.Prac. & Rem. Code §71.031. This brief responds to the arguments in that amicus brief and also

to assertions made by Petitioners in their post-submission briefs.

1. To whom is the statute directed?

The new amici argue that it is unclear whether §71.031(a) is directed to courts or to plaintiffs. The section provides that "an action" which meets the enumerated requirements "may be enforced in the courts of this state." If the section is directed to plaintiffs, amici contend, then clearly plaintiffs have the discretionary right to enforce their actions here; if, however, the section is directed to court, then courts "may" or may not enforce actions as they please.

Amici assert that it is impossible to discern to whom the statute is directed, apparently in the belief that such an ambiguity will free this Court from its obligation to follow a patently clear law. There is, however, no such ambiguity involved: the statute is, and can only be, directed to plaintiffs.

First, plaintiff possess action; courts do not. As a matter of common sense, a statute concerning actions is necessarily directed to those who possess actions. The Legislature logically directed provisions affecting rights of enforcement of actions to those whose rights were being affected.

Second, it is easy to discern whether the section is directed to courts or to plaintiffs by insertion of the alternative clarifying subject phrases "by courts" or "by plaintiffs." Under amici's suggested interpretation, the statute would provide that "an action . . . may be

enforced by courts in the courts of this state . . . " Clearly this construction requires a redundant and nonsensical reading of the actual language.

Conversely, if we insert a phrase directing the section to plaintiffs, the statute still read sensibly: "an action . . . may be enforced by plaintiffs in the courts of this state . . . "

In short, there can be no uncertainty about the recipient of the statutory right of enforcement. If clarifying language is inserted, the section can be read sensibly only when directed to plaintiffs.

Finally, it is plain that when the Legislature wished to speak to court, it knew how to do so. Section 71.031(c) provides that "[t]he court shall apply the rules of substantive law that are appropriate under the facts of the case." Had it intended §71.031(a) to apply to courts and not to plaintiffs, the Legislature would have used similar language.

2. Public Policy

Petitioners have argued that it is not appropriate for an American court to decide this case. In its post-submission brief, Dow cites *Harrison v. Wyeth Labortories*, 510 F.Supp. 1 (E.D.Pa. 1980). The crucial distinction between *Harrison* and this case is that in *Harrison* the product in question was manufacturer in the foreign forum where plaintiffs resided. This difference was noted in a subsequent opinion denying forum non conveniens dismissal of suits brought by foreign Dalkon Shield claimants. *Hodson v. A. H. Robins Co.*, 529 F.Supp. 809, 821 (E.D.Va. 1981).

The Fourth Circuit affirmed this ruling after *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), was decided. *Hodson v. A. H. Robins Co.*, 715 F.2d 142 (4th Cir. 1983). See also *Kontoulas v. A. H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984).

In regard generally to the issue of whether American courts should decide controversies involving foreign plaintiffs and wrongdoing by American defendants, Respondents refer the Court to an opinion by Judge Bork, *Friends for all Children, Inc. v. Lockhead Aircraft Corp.*, 7171 F.2d 602 (D.C. Cir. 1983), also decided after *Piper Aircraft*. In this case, Vietnamese orphans were injured in the crash of a jet during an airlift evacuation program. They had been on their way to meet new adopting parents in several foreign countries. The decision to undertake the airlift program was made in Washington, D.C. The plan was manufactured in the United States, but not in Washington, and Lockheed was not headquartered in Washington. The United States joined Lockheed in urging forum non conveniens dismissal.

Nevertheless, Judge Bork, joined by then-Judge Scalia and Senior Judge Bazelon, held that even though alternative adequate forums existed, it was appropriate for an American court to pass on the liability of Lockheed. See 717 F.2d at 609-10.

Respondents submit that when compared to the *Lockheed* case, the present action merits American judicial involvement even more strongly. The pesticides were researched, designed, formulated, manufactured, labeled, distributed and shipped in the United States by American companies. They were sold to an American company for use on American-owned land by workers employed by

the American company. They were applied to Dole bananas grown entirely for American consumption. The bananas were shipped back to America and sold entirely in American stores. Petitioners would have everything in the equation be American but the consequences.

3. Witnesses and Records

Shell has stipulated it will produce witnesses in this country, see Shell's post-submission brief at 2, and Respondents did not assert otherwise. What Respondents pointed out, and again call to the Court's attention, is that *both Shell and Dow refuse to make their witnesses or documents available in Costa Rica* – despite Respondents' stipulation to appear in Texas for deposition and medical examination.

28 U.S.C. §1782 adds nothing to Petitioners' position. That statute merely allows[1] a U.S. district court to make Petitioners produce witnesses in this country – something they would be required to do in any event. If the case is tried here, Petitioners would of course have to produce witnesses in this country; convenience of litigation is not furthered by an offer to produce witnesses in this country for litigation in Costa Rica.

To repeat: if the case stays here, Petitioners naturally must produce witnesses in this country. The magnanimous offer to produce witnesses *in the United States* if the case is tried in *Costa Rica* is meaningless.

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[1] The provision is discretionary. *In re Letters Rogatory from the Tokyo District Court*, 539 F.2d 1216 (9th Cir. 1976).

Respondents are unable to account for the apparent assertion by Shell, post-submission brief at 3, that officials of Respondents' employer have not testified in this action. Again, Standard Fruit Company and Dole Fresh Fruit Company are headquartered in Boca Raton; officials of these companies have testified; and Respondents will provide the Court with copies of their deposition transcripts if desired.

Shell continues to state that some medical records have not been produced, and complains that one treating physician who has stated he will testify in Houston "refused to provide an affidavit for Shell for use in this litigation." Shell has never supported its claim that more medical records exist. To Respondents' knowledge they do not exist, and Shell's continued insistence on this point cannot create them. As for the doctor, one can only assume that he could not swear to whatever it is Shell asked him to swear to.

Finally, Shell still insists that the several years of litigation in this case have been limited to forum non conveniens issues. The transcript, however, reflects the long and exhaustive activity in this case on product identification, medical and limitations issues. As noted in oral argument, Shell and Dow could have stood on their forum non conveniens plea five years ago; instead, they propounded and conducted extensive discovery.

4. Sales of DCBP for use in Costa Rica After American Regulatory Action.

On April 15, 1976, the Environmental Protection Agency listed DBCP as a candidate for "Rebuttable

Resumption Against Registration" status "based on potential for carcinogenic effects." On August 11, 1987, Dow halted all production and *American* sales of DBCP. On August 25, 1977, Dow announced the recall of all DBCP from users and distributors; Shell took the same action the next day.

On Sept. 5, 1977, EPA issued its notice to suspend DBCP use because "not only is DBCP a powerful carcinogen in animals which provides strong evidence that it is a human carcinogen, but that it may also damage human reproductive functions and may cause sterility in males." See EPA suspension notice at 6; see generally 43 Fed. Reg. 40911 (Sept. 13, 1978).

The suspension notices, the halt in production, and recall from American users all took place well before February 23, 1978 when Dow sent a signed letter agreement to Standard Fruit, acknowledging the toxic effect of its pesticide and requiring Standard Fruit to hold Dow harmless for injuries resulting from continued use of Dow products. See Exhibit "A". Dow sales to Standard Fruit in Costa Rica continued until as least November, 1978, *over a year after Dow recalled all DBCP from American users.*

The letter attached as Exhibit "A" also stated that construction of the indemnity agreement is to be governed by Michigan law. Dow and Shell have long invoked imaginary third-party defendants, arguing that such defendants may not be able to be joined in Texas, but have never identified any such defendants. The obvious third-party defendant, of course, is Standard Fruit, and

Standard Fruit and Dow have already agreed that their dispute will be governed by American law.

5. Bhopal case

Petitioners have cited the Bhopal actions filed in Jefferson County as proof that the state is flooded by foreign actions. The distinction between those cases and the present case, however, demonstrates that actually very few foreign cases are even governed by §71.031.

India does not have equal treaty rights with the United States. Therefore, the right to enforce an action is not granted by §71.031(a), because subsection (3) requires that "in the case of a citizen of a foreign country, the country has equal treaty rights with the United States." This was the first ground of dismissal urged by Union Carbide in its motion to dismiss. See attachment to Dow's post-submission brief.

A publication of the U. S. State Department lists 43 countries with "Fellowship, Commerce and Navigation" treaties in force with the United States similar to that between the United States and Costa Rica. Thirty-three of these countries have treaties with the United States containing provisions concerning equal rights of court access. The State Department lists are attached as Exhibit "B".

Since there are over 170 countries in the world, the vast majority of all foreign plaintiffs cannot even invoke §71.031. As discussed previously, those suits which do come under the statute will, in practice, be limited by

admiralty law and removal rules to nonmaritime cases with bona fide Texas defendants.

In short, Texas simply will not be flooded by foreign causes of action. Section 71.031 and its predecessors have existed for 76 years, a holding affirming its mandatory nature has existed for 57 years, and we have not been flooded. Treaties and jurisdictional rules will take care of the vast majority of foreign claims today.

Respectfully submitted,

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BY: /s/ CHARLES S. SIEGEL
CHARLES S. SIEGEL

EXHIBIT "A"

(SEAL) DOW CHEMICAL INTERNATIONAL INC.

SAN FRANCISCO SALES OFFICE
DRAWER M
WALNUT CREEK, CALIFORNIA 94456
PHONE 415 994-2345
CABLE OCCIDENTAL

February 23, 1978

Mr. Paul Sink
Castle & Cooke, Inc.
50 California Street
San Francisco, Calif. 94111

Dear Paul:

I am enclosing the following documents:

1. Letter Agreement with Standard Fruit signed by Standard Fruit and Dow.

2. Addendum to the Sales Contract with Castle & Cooke spelling out the volumes, formulations, packages and unit price for each. Please sign a copy and return to me.

3. A draft of the P.R. release we would plan to make in case of adverse press reactions. We suggest that Castle & Cooke/Standard Fruit read this and comment on it to us if you so desire. We do not plan to release this unless absolutely necessary. Castle & Cooke/Standard Fruit may want to draw up a similar release, but we strongly recommend you follow the same guidelines as to wording and release. We would appreciate receiving a copy of your proposed draft release for our review and comments.

4. Fumazone* formulation suggestions for Castle & Cooke – Philippines.

---

*Trademark of The Dow Chemical Company

5. Secrecy agreement on the Fumazone formulations to be signed and returned to me.

6. The new Fumazone label will be given to you shortly as well as the inventory and pricing on the needed stabilizers that we have in stock and will offer to you.

Please note – the sale of this Dibromochloropropane product includes the right in the Philippines to formulate and use the quantity shipped as a nematicide under our Philippine patent.

We hope you find everything in order and I wish to express our appreciation for your cooperation and assistance.

Best regards.

Very truly yours,

/s/ B.V. Daley
B.V. Daley
Manager

EVD/mlm

enc.

(SEAL) THE DOW CHEMICAL COMPANY

BENNETT BUILDING
2639 DOW CENTER
MIDLAND, MICHIGAN 48640

Standard Fruit Company
50 California Street
San Francisco, CA. 94111

This Letter Agreement will serve to confirm the Agreement reached amongst The Dow Chemical Company (DOW), Dow Chemical International Inc. of Delaware (DOWINTAL) and Standard Fruit Company (STANDARD FRUIT COMPANY), in respect of the purchase of "Fumazone" Brand Dibromochloropropane ("Fumazone") from DOWINTAL.

In connection with the purchase of "Fumazone" from DOWINTAL, STANDARD FRUIT COMPANY hereby acknowledges receipt from DOW of certain information pertaining to the toxicity and use of "Fumazone", a description or copy of all such material which has been attached hereto.

STANDARD FRUIT COMPANY hereby confirms to DOW and DOWINTAL that it has read and understands such information. In addition, STANDARD FRUIT COMPANY herein agrees that: a) it has maintained policies and practices relating to the handling, storage and use of "Fumazone" which takes into consideration the toxic nature of the material, as the same have been disclosed by DOW and DOWINTAL; b) it is familiar with temporary OSHA standards and has implements or will implement applicable work standards in respect of protective clothing training, etc. referred to therein; and c) it will

assume the entire responsibility, liability, and risk arising out of or in connection with its use of "Fumazone" purchased from DOWINTAL and will indemnify and hold harmless DOW, DOWINTAL, any other corporation controlled by or controlling DOW or DOWINTAL, or their agents, servants, and employees, from and against any and all losses, expenses, demands, and claims made against any of them by any employee, officer, or director of Castle & Cooke, Inc. or STANDARD FRUIT COMPANY or any subcontractor or applicator of Castle & Cooke, Inc. or STANDARD FRUIT COMPANY or their agents, servants, or employees, or by any third party whatsoever because of any injury or alleged injury to person or persons (including death) or damage or alleged damages to property, arising out of or in connection with the use and application of said "Fumazone" purchased from DOWINTAL, and further agrees to take over and pay the cost of DC defense in any such action, provided, however, that STANDARD FRUIT COMPANY shall have no obligation hereunder to indemnify, hold harmless, and defend DOW and DOWINTAL as herein provided in situations where any such injury or damage arises out of DOW's primary negligence in respect of the manufacture of such "Fumazone" which fails to meet the specifications therefor. DOW or DOWINTAL shall have the option to assume its own defense, in which case STANDARD FRUIT COMPANY shall reimburse DOW or DOWINTAL for the reasonable cost of such defense, provided that all the conditions of this Latter Agreement set forth above shall have been met:

Said "Fumazone" is being supplied by DOW or DOWINTAL without warranty of any kind, except that, said

material at time of delivery to STANDARD FRUIT COMPANY shall conform to the specifications thereof, DOWINTAL is conveying good title thereto, and such material shall be delivered free from any lawful security, lien, or encumbrance. *Neither DOW nor DOWINTAL make any warranty of merchantability or fitness for a particular purpose, nor is there any other express or implied warranty, except as provided herein.* DOW or DOWINTAL's liability for failure of this material to conform to the above-described warranties shall be limited to returning to STANDARD FRUIT COMPANY the amount of the purchase price of goods previously received by DOWINTAL. In no event shall DOW or DOWINTAL be liable for any incidental or consequential damages arising out of or in any way connected with DOWINTAL's sale to STANDARD FRUIT COMPANY of this material.

STANDARD FRUIT COMPANY hereby agrees that it is purchasing Fumazone for its or the use of its subsidiaries or affiliates outside the U.S.A. It will not this material to any persons or companies other than any subsidiaries or all outside the U.S.A. of STANDARD FRUIT COMPANY or Castle & Cooke, Inc., without obtaining DOW's and DOWINTAL's Written Consent.

STANDARD FRUIT COMPANY hereby agrees that in the event DOW or DOWINTAL should elect for any reason to withhold delivery on all or any portion of "Fumazone" referred to herein. DOW or DOWINTAL shall have no liability whatsoever in respect thereof except to return to STANDARD FRUIT COMPANY that portion of the purchase price previously received for such material that is not shipped.

STANDARD FRUIT COMPANY hereby agrees that this Letter Agreement shall be governed by the laws of the State of Michigan.

STANDARD FRUIT COMPANY hereby acknowledges and agrees that any technical or other advice or support relating to the handling, storage or use of "Fumazone" furnished by DOW, DOWINTAL or any company controlled by or controlling either of them shall be furnished in good faith only, that neither DOW, DOWINTAL, or such other company makes any warranties whatsoever with respect thereto, and that STANDARD FRUIT COMPANY shall have sole responsibility for determining the suitability of such advice.

If this Letter Agreement is in accordance with your understanding of the agreement amongst DOW, DOWINTAL and STANDARD FRUIT COMPANY, please have an authorized officer of your company sign and date both of the duplicate originals of this Latter Agreement in the place indicated below and return one original thereof to the undersigned for our files.

Very truly yours,

THE DOW CHEMICAL COMPANY

By E. B. Barnes
E. B. Barnes
Title Executive Vice President
Date February 6, 1978

DOW CHEMICAL INTERNATIONAL INC. OF DELAWARE

By R. W. Lundeen
R. W. Lundeen
Title Vice President
Date January 30, 1978

AGREED TO AND ACCEPTED:

STANDARD FRUIT COMPANY

By Illegible
Title Assistant Secretary
Date January 19, 1978

Enclosure